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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 150

WILLIAM D. PELLEY, PETITIONER

v.

JOHN B. COLPOYS, UNITED STATES MARSHAL IN AND FOR THE DISTRICT OF COLUMBIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 325–330) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered April 14, 1941 (R. 330–331). Motion for rehearing was denied May 6, 1941 (R. 337). The petition for a writ of certiorari was filed June 9, 1941. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner is under extradition order, issued in proper form, returning him to North Carolina for further proceedings in connection with a prior conviction. The single question is whether he is "charged with crime" in that State.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 2, Clause 2 of the Constitution provides:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

Section 5278 of the Revised Statutes (U. S. C., Title 18, Section 662) provides:

> Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor

> or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. * * *

The Act of March 3, 1901, C. 854, 31 Stat. 1189, 1340, Sec. 930 (D. C. Code (1929), Title 6, Section 377) provides:

> In all cases where the laws of the United States provide that fugitives from justice shall be delivered up, the chief justice of the supreme court of the District of Columbia [now the District Court of the United States for the District of Columbia, 49 Stat. 1921] shall cause to be apprehended and delivered up such fugitive from justice who shall be found within the District, in the same manner and under the same regulations as the executive authorities of the several States are required to do by the provisions of sections fifty-two hundred and seventy-eight and fifty-two hundred and seventy-nine, title sixty-six, of the Revised Statutes of the United States, * * * and all executive and judicial officers are required to obey the lawful precepts or other process issued for that purpose, and to aid and assist in such delivery.

STATEMENT

Petitioner was indicted and convicted in 1935 in the Superior Court of Buncombe County, North Carolina, on the first two counts of a sixteen count indictment. The first count charged petitioner with the crime of selling securities, and causing them to be sold, without registering as a dealer or salesman as required by law; the second count charged him with making false representations for the purpose of selling securities and stocks (R. 8, 208). On February 18, 1935, a sentence of imprisonment of from one to two years was imposed under Count One and suspended for five years upon the following three conditions: (1) that he pay a fine of $1,000 and costs; (2) that he "be and remain continuously of good behavior;" and (3) that he refrain from publishing or distributing certain designated periodicals concerning the sale of securities. Prayer for judgment on Count Two was continued for five years (R. 13–15, 208).

Capias for petitioner's arrest was issued October 19, 1939, to bring him before the court for a hearing on the execution and imposition of sentence upon his 1935 conviction (R. 17–18). Petitioner was at that time, and has been since, outside the State of North Carolina (R. 208–209).

On February 23, 1940, an application for requisition was filed with the Governor of North Carolina by the prosecutor of Buncombe County, request-

ing the extradition of petitioner from the District of Columbia. Appended to the application were two certified copies of the indictment upon which petitioner was tried and convicted (R. 8, 11, 208). The application set forth the facts substantially as related above and certified that in the opinion of the applicant "the ends of justice require the arrest and return of the accused to this State for sentence and judgment upon conviction for the felony set forth in the Second Count in said Bill of Indictment, and for putting into effect the suspended sentence imposed on the First Count in said Bill of Indictment" (R. 9). The application further alleged that the applicant was advised and believed that petitioner, while in the State of North Carolina, "committed various acts and engaged in conduct and practices which constituted a violation of his parole and probation and justified the imposition of judgment," the substance of which is there set forth in detail (R. 10).

On March 8, 1940, the Governor of North Carolina forwarded to the Chief Justice of the District Court of the United States for the District of Columbia requisition papers, properly authenticated, which included the *capias,* certified copies of the indictment upon which petitioner was tried and convicted, and the above-described application (R. 12).

The Chief Justice, after a hearing on this requisition, found the petitioner to be substantially

charged with crime in the State of North Carolina and to be a fugitive from its justice. An order was issued surrendering him to the agent of that State (R. 22–24).

Petitioner thereupon filed a petition for a writ of habeas corpus in the District Court, seeking his release from custody (R. 1–6). Upon issuance of the writ (R. 7) and after hearing thereon (R. 41–185), the District Court dismissed the writ of habeas corpus and remanded petitioner to the custody of respondent for return to the State of North Carolina (R. 186). Motion for rehearing was denied (R. 187). Upon appeal to the United States Court of Appeals for the District of Columbia, that court affirmed the action of the trial court (R. 325–330).

ARGUMENT

The petitioner's contentions revolve around the proposition that on March 12, 1940, the date on which the order of extradition was issued (R. 22, 23), he was no longer "charged with crime" in North Carolina.

First. The crime with which the petitioner was charged at the time of the extradition order was the offense against the North Carolina securities laws for which he had been convicted in 1935. For purposes of the applicable Constitutional[1] and statutory[2] provisions, one who has been found

[1] U. S. Constitution, Article IV, Section 2.
[2] U. S. C., Title 18, Section 662.

guilty does not cease to be "charged with crime" until the judgment of conviction has been satisfied.[3] *Hughes* v. *Pflanz,* 138 Fed. 980 (C. C. A. 6th); *Reed* v. *Colpoys,* 99 F. (2d) 396 (App. D. C.), certiorari denied, 305 U. S. 598; *Drinkall* v. *Spiegal,* 68 Conn. 441; *Cappola* v. *Platt,* 123 Conn. 38, certiorari denied, 302 U. S. 726; *Ex parte Nabors,* 33 N. M. 324. Clearly, therefore, this petitioner would continue to be "charged with crime" until the obligations imposed upon him by the 1935 judgment of the Superior Court of Buncombe County were satisfied.

The petitioner argues, however, that these obligations had been discharged long before the order of

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[3] In *Hughes* v. *Pflanz*, the Circuit Court of Appeals observed: "The term 'charged with crime,' as used in the Constitution and statute, seems to us to have been used in its broad sense, and to include all persons accused of crime. It would be a very narrow and technical construction to hold that after the accusation, and before conviction, a person could be extradited, while after conviction, which establishes the charge conclusively, he could escape extradition. The object of the provisions of the Constitution and statute is to prevent the escape of persons charged with crime, whether convicted or unconvicted, and to secure their return and punishment if guilty. Taking the broad definition of 'charged with crime' as including the responsibility for crime, the charge would not cease or be merged in the conviction, but would stand until the judgment is satisfied. It would include every person accused, until he should be acquitted, or until the judgment inflicted should be satisfied. Any other construction would prevent the return of escaped convicts upon the charge under which they had been sentenced, and defeat in many instances the ends of justice." (138 Fed. at 983.)

extradition was entered. He makes the alternative contentions (a) that the date of expiration of the "charge" was the date in 1935 on which he paid the fine and costs under the sentence imposed on the first count (Pet. 22–27), or (b) that the date of expiration was February 18, 1940, the end of the five year period during which execution of the prison sentence on the first count and the imposition of sentence on the second count were suspended. (Pet. 32–35.)

(a) It is perfectly apparent from the papers which the District Court had before it that the petitioner had not satisfied the entire judgment against him by the payment of the fine and costs imposed on the first count.

In the first place, the suspension of the sentence of imprisonment on this count was expressly subject to three conditions: that the petitioner pay a fine of $1,000 and the costs of the prosecution; that he remain continuously of good behavior; and that he refrain from publishing or distributing in North Carolina certain literature concerning the sale of securities. The petitioner makes no effort to explain how the latter two conditions were fulfilled by the payment of the fine and costs. By their very nature they could not be discharged until the expiration of the five-year period.

Moreover, with the petitioner's consent, the prayer for judgment on the second count was con-

tinued for five years. As the Court of Appeals observed (R. 327), this practice of postponing the imposition of sentence is one of long standing in North Carolina, and enjoys both common law and statutory sanction.[4] It is substantially equivalent to the more conventional forms of probation. This continuation of the prayer for judgment on the second count, without more, would have been sufficient to establish the jurisdiction of the Superior Court over the petitioner for the entire five-year period. The petitioner, however, appears to insist (Pet. 22–27) that the order suspending the imposition of sentence on the second count was void from its inception because it envisaged the possibility of sentencing him on different counts of the same indictment at different times. It is a sufficient answer that petitioner waived his objection by his original consent to the order in 1935, and that the question whether, under the decisions and statutes of North Carolina, sentence may be imposed and its execution suspended on one count while imposition of sentence is continued on another, is a question for the courts of North Carolina and not for the District Court of the District of Columbia in habeas corpus proceedings.[5] *State ex rel. Lea* v.

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[4] See *State* v. *Ray*, 212 N. C. 748. North Carolina Code (Michie 1939) § 4665 (1).

[5] It should be noted that both before and after the enactment of the Federal Probation Act of 1925 (U. S. C., Title 18, Sections 724–728), the practice of imposing and execut-

Brown, 166 Tenn. 669, certiorari denied, 292 U. S. 638.

(b) It is true that in normal course the charge against the petitioner would have expired on February 18, 1940, five years from the date of sentencing and several weeks before the issuance of the order of extradition. On October 19, 1939, however, a *capias* issued from the Superior Court of Buncombe County for his arrest (R. 17). At that time more than four months of the period of probation remained. The extradition papers showed that a diligent search for him was conducted in North Carolina and many other states (R. 18, 19). The application to the Governor of North Carolina by the prosecutor of Buncombe County (R. 8), and the Governor's requisition for extradition (R. 12) represented the final steps necessary to the enforcement of the *capias.* It may hardly be asserted that a probationer can escape the valid process of a court simply because a diligent search for him has failed to result in his apprehension before the expiration of the probationary period. See *Anderson* v. *Corall,* 263 U. S. 193; *Stockton* v.

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ing sentence on one count of an indictment while postponing the imposition of sentence on another count has been approved. *United States* v. *Blaisdell,* 24 Fed. Cas. No. 14,608 (S. D. N. Y. 1869); *Kreuzer* v. *United States,* 254 Fed. 34, 39, (C. C. A. 8th, 1918); *Reeves* v. *United States,* 35 F. (2d) 323 (C. C. A. 8th, 1929); *Cooper* v. *United States,* 91 F. (2d) 195, 199 (C. C. A. 5th, 1937). Cf. *Scalia* v. *United States,* 62 F. (2d) 220 (C. C. A. 1st, 1932). But cf. *Gillespie* v. *Walker,* 296 Fed. 330 (C. C. A. 4th, 1924).

Massey, 34 F. (2d) 96 (C. C. A. 4th); *Platek* v. *Aderhold,* 73 F. (2d) 173 (C. C. A. 5th); *People ex rel Patterson* v. *Bockel,* 270 N. Y. 76.

We do not understand the petitioner to make such an assertion. Instead, he appears to insist that the *capias* was not valid process, that it was a nullity, and that thus it did not interrupt the period of probation which consequently came to an end on February 18, 1940. We think that the technical sufficiency of the *capias,* like that of an indictment, is not open to question in habeas corpus proceedings to contest an order of extradition. *Munsey* v. *Clough,* 196 U. S. 364, 373; *Drew* v. *Thaw,* 235 U. S. 432, 439. But the bulk of the petition is devoted to an attack upon this *capias* and the judge who issued it. Petitioner evidently concedes, and the opinion of the Court of Appeals makes clear (R. 327–328), that the North Carolina court had the power to issue a *capias.*[6] But he charges, first, that the judge was moved solely by malice, and, second, that the *capias* was supported by no allegation on the part of the prosecutor or the probation authorities or the judge himself that the petitioner

[6] Section 4665 (4) of the North Carolina Code provides: "* * * At any time during the period of probation or suspension of sentence, the court may issue a warrant and cause the defendant to be arrested for violating any of the conditions of probation or suspension of sentence * * *. Upon such arrest, with or without warrant, the court shall cause the defendant to be brought before it in or out of term and may revoke the probation or suspension of sentence, and shall proceed to deal with the case as if there had been no probation or suspension of sentence."

had violated the terms of his probation or misbehaved in any way.

The first objection hardly merits a reply,[7] since it has been specifically held by this Court that the motives of the officials of the demanding state are not reviewable in a habeas corpus proceeding to test the validity of extradition. *Drew* v. *Thaw*, 235 U. S. 432, 439. See *Pettibone* v. *Nichols*, 203 U. S. 192, 203, 217; *United States* v. *Superintendent of County Prisons*, 111 F. (2d) 409 (C. C. A. 3d).

Petitioner has produced nothing to support his second objection. Nothing in the applicable North Carolina statute [8] requires that as a condition precedent to the issuance of *capias* for a probationer, a charge of misbehavior must be filed by the prosecutor or by the probation authorities or that the judge must accompany the *capias* with his own assertion that there has been a violation of the terms of probation. Nor has he pointed to a decision by any court that such a requirement exists. On the contrary, this Court has held that Section 2 of the Fed-

[7] However, the record does not support the charge (Pet. 13) that the judge who issued the *capias* had had himself transferred from his usual circuit to the circuit embracing Buncombe County for the purpose of persecuting the petitioner. It reveals, instead, that the judge in question and another agreed, for reasons not stated, to exchange circuits for the entire fall term of 1939 and that the Governor officially approved the exchange (R. 15–16). Moreover, the record shows that the judge who is to conduct the hearing in the Superior Court of Buncombe County to determine whether sentence shall be imposed and executed will not be the judge who issued the *capias* (R. 222, 226).

[8] See note 6, *supra*.

eral Probation Act of 1925 (U. S. C., Title 18, Section 725), which is strikingly similar to the North Carolina statute, vests the federal courts with power to arrest in such a case without the formulation of charges or notice of charges, there being no "limiting requirements" in that respect contained in the Act. *Burns* v. *United States,* 287 U. S. 216, 221. See *Moss* v. *United States,* 72 F. (2d) 30, 32 (C. C. A. 4th). No reason has been advanced for a different rule here.

We urge, therefore, that the *capias* of October 19, 1939, was validly issued within the term of petitioner's probation and that it must be regarded as having stayed the running of the five-year period until he had been apprehended. See *Anderson* v. *Corall, supra; Stockton* v. *Massey, supra; Platek* v. *Aderhold,* 73 F. (2d) 173, at 175; *Hinson* v. *Rochelle,* 156 N. C. 250. As a result, the petitioner continued to be "charged with crime" after the five-year period expired on February 18, 1940.

Second. On the assumption, which we have shown to be incorrect, that he was no longer charged with his original offense at the time the order of extradition was entered, the petitioner goes on to demonstrate that no charge had been made that he had misbehaved or violated the conditions of his probation. We regard the contention as irrelevant and think that it stems from confusion with respect to the nature of the offense charged. The crime with which the petitioner is charged, as we had said, is the offense against the securities laws of North Caro-

lina for which he was convicted in 1935. It has nothing to do with his conduct since that time. The question whether he has behaved in a manner warranting the execution and imposition of sentence on the original offense is a question to be determined by the North Carolina court after the petitioner has been returned. It is a question which was beyond the jurisdiction both of the Chief Justice in passing upon the request for extradition, and of the District Court in the habeas corpus proceedings. *Ex parte Nabors,* 33 N. M. 324; *Cappola* v. *Platt,* 123 Conn. 38. See *State* v. *Everett,* 164 N. C. 399.

CONCLUSION

No special and important reason for the exercise of the discretionary power to review on certiorari has been shown in this case. No conflict of decisions is involved and the decision of the Court of Appeals is correct. We, therefore, respectfully submit that the petition should be denied.

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